U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 27 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary as an alien of exceptional ability as an "Intrusion Detection Systems Analyst," pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The director determined that the labor certification did not require an alien of exceptional ability as required by 8 C.F.R. § 204.5(k)(4) and therefore "the petition cannot be approved."

On appeal, counsel submits a brief and additional evidence. The AAO notes that while counsel restates the beneficiary's qualifications on appeal, the sole issue in the instant petition is whether "[t]he job offer portion of an individual labor certification...requires...the equivalent of an alien of exceptional ability." For the reasons discussed below, the AAO upholds the director's conclusion that the petitioner has not established eligibility for the exclusive classification sought. The AAO conducts appellate review on a *de novo* basis. AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

(C) A license to practice the profession or certification for a particular profession or occupation

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

(E) Evidence of membership in professional associations

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

II. ANALYSIS

A. The Offered Position

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation for classification as aliens who are members of the professions holding advanced degrees or aliens of exceptional ability:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of *the individual labor certification*, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent *or an alien of exceptional ability.*

(Emphasis added.) As required by statute, a certified ETA Form 9089, Application for Permanent Employment Certification, accompanied the petition. However, the job offer portion of the labor certification in this matter indicates that the proffered position requires a bachelor's degree in Management Information Systems or Computer Science and 36 months of related experience or a master's degree. The ETA Form 9089 does not provide any other requirements, including specific skills or other requirements, in item 14 except for indicating that "[a]ny suitable combination of education, training or experience is acceptable." The petitioner does not contest the director's

findings that the job offer portion of the labor certification does not require an individual of exceptional ability. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1228 n. 2, *Hristov v. Roark*, 2011 WL 4711885 at *9 (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

Rather, counsel's sole assertion is that the director erred as a matter of law by requiring that the job offer portion of the labor certification require an individual of exceptional ability. The director discussed the deficiencies in the job offer portion of the labor certification and found that the petitioner failed to "establish [that] the offered job requires an alien of exceptional ability." On appeal, counsel asserts that "there is no requirement to demonstrate that the job requires exceptional ability" because the "case is based on an Exceptional Ability upgrade and not a Schedule A application or Pilot Program." Contrary to counsel's assertion, the plain language of the regulation at 8 C.F.R. § 204.5(k)(4) is not limited to Schedule A applications or Pilot Programs; it specifically includes aliens applying for classification as an alien of exceptional ability supported by an individual labor certification. USCIS is bound by that regulation. Counsel further asserts that "to demonstrate 'exceptional ability' on the Form 9089 filed in support of the EB3 PERM/Labor Certification would be contrary to the Department of Labor regulations." The AAO notes that the instant petition is based upon a labor certification previously utilized by the petitioner under a different classification. While the regulations permit a certified labor certification to be used in support of more than one petition, there is no requirement that the petitioner utilize a labor certification which was previously certified for a different, lesser employment classification. The labor certification filed in support of an application for classification as an alien of exceptional ability must still comply with the regulations at 8 C.F.R. § 204.5(k)(4).

Accordingly, the petition cannot be approved.

III. CONCLUSION

The petitioner has not established eligibility pursuant to section 203(b)(2) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.